A

PP

v.

ANDAL AROLLA

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
ABDUL RAHMAN SEBLI J
[CRIMINAL TRIAL NO: BKI-45-3/9-2011]
3 AUGUST 2012

C ***CRIMINAL LAW:*** *Penal Code - Section 302 - Murder - Prosecution's case based on eyewitnesses' evidence - Defence's version contradicted evidence by eyewitness - Whether prima facie case established - Whether case proved beyond reasonable doubt - Evidence on alleged murder weapon - Whether admissible - Admissibility of defence's version*

D ***EVIDENCE:*** *Corroboration - Accomplice evidence - Evidence on alleged murder weapon contradicted by eyewitness - Whether evidence admissible*

The accused, a Filipino national, was charged with the offence of murder under s. 300 of the Penal Code ('the Code'). In proving
E its case, the prosecution relied on the account of three eyewitnesses, namely PW12 and PW13, both accomplices of the accused and PW16, the deceased's friend. On the ill-fated night, the accused told PW12 that he wanted to buy *syabu* from the deceased, a drug pusher, and after the transaction, the deceased
F was to be killed. As planned, PW13 brought a 'Rambo' knife and arranged to meet the deceased at a bridge. When the deceased arrived, the accused told him that they had lost their money and the deceased drove off. Again, the accused and his accomplices hatched their plan to kill the deceased. An opportunity presented
G itself when the deceased came back to the scene with PW16. Through the open window of the car, the accused stabbed the deceased on the neck and chest while on the other window, PW13 stabbed PW16. The car accelerated and plunged into a nearby river. However, PW16 survived the attack and headed
H straight to the police station to make a report. In his evidence, PW16 stated that he only saw the accused repeatedly punching the deceased and the deceased trying to ward off the attack. In defence, the accused recounted that their initial plan was to rob the deceased. The deceased was startled when the accused place
I a knife on his neck. This caused the deceased to accelerate the car and that was when the knife accidentally pierced his neck. The court was confronted with the questions of: (i) whether a

prima facie case had been established against the accused; (ii) the admissibility PW12's and PW13's evidence in relation to the alleged murder weapon; and (iii) whether the defence's evidence was admissible. A

Held (convicting the accused and sentencing him to death): B

(1) On the strength of PW12's and PW13's evidence as corroborated by PW16, a *prima facie* case had been established against the accused. By stabbing the deceased with a dangerous weapon on a vital part of his body, the accused must have intended to cause his death and his act fell under all four definitions of murder. In any case, the injury that he intended to cause was sufficient in the ordinary course of nature, to cause death. The prosecution's case was not affected albeit not having recovered the murder weapon. The evidence was incontrovertible that a knife was used in the attack and was corroborated by an independent forensic evidence. (paras 17-18) C D

(2) The unchallenged forensic evidence showed that the neck injury was caused by a sharp object. This injury could not have been caused by a clenched fist. Besides, PW16 did not state that the accused did not use any weapon. He was unsure of what the accused was using to hit the deceased as he was facing his back. Considered together with the evidence of PW12 and PW13, what PW16 saw was, beyond reasonable doubt, the accused in the act of stabbing the deceased with a knife. (para 13) E F

(3) The accused's story contradicted the evidence of PW12, PW13 and PW16, which the court accepted as the truth. If the neck injury was indeed caused by accident as claimed, it did not explain the 10 other injuries suffered by the deceased, including the chest injury evidenced by the post mortem report. The accused's intention all along was not only to rob the deceased but to finish him off as well. Moreover, the defence of accident was never put to PW12, PW13 and PW16 in cross-examination. It was incumbent on the accused to do so as their version was diametrically opposed to his version. Such failure must be taken to mean that their version could not be disputed at all. (paras 22, 26 & 29) G H I

Case(s) referred to:
AEG Carapiet v. AY Derderian AIR [1961] Cal 359 ***(refd)***
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Browne v. Dunn [1893] 6 R 67 ***(refd)***
Davies v. Director of Public Prosecutions [1954] 1 All ER 507 HL ***(refd)***
Mat v. PP [1963] 1 LNS 82 HC ***(refd)***
Miller v. Minister of Pensions [1947] All ER 372 ***(refd)***
PP v. Ibrahim Mahmud [2001] 3 CLJ 284 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Wong Swee Chin v. PP [1980] 1 LNS 138 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(h), 182A(1)
Penal Code, ss. 80, 300(c), 302

For the prosecution - Raja Zaizul Faridah Raja Zaharudin DPP
For the accused - Ram Singh; M/s Ram Singh & Co

Reported by Najib Tamby

JUDGMENT

Abdul Rahman Sebli J:

[1] The accused, a Filipino National was charged with murder and the charge against him is as follows:

> That you, on the 8th day of April 2011, at about 1.00 a.m. at a bridge, Jalan Limbungan Kapal, in the District of Kuala Penyu, in the State of Sabah, did commit murder by causing the death of one Mccalvin Allen Angkee (NRIC NO: 780921-21-5415) and that you have thereby committed an offence punishable under Section 302 of the Penal Code (Act 574) of the Laws of Malaysia.

[2] At the conclusion of the trial I found him guilty as charged and sentenced him to death. These are my grounds.

The Facts

[3] The prosecution relied on the testimony of three eyewitnesses to prove its case. They were Edison bin Atan ("PW12"), Akis bin Jum ("PW13") and Faizal bin Maslin ("PW16"). PW12 and PW13 were the accused's accomplices while PW16 was the deceased's companion. PW12's evidence is that on the night of the incident the accused told him he wanted

to buy *syabu* from the deceased and that the deceased was to be killed after the transaction. Apparently the deceased was a drug pusher and this was confirmed by PW16 in his evidence. A

[4] As a preparation for the murder the accused asked PW13 to get a knife from his (PW13) house, which PW13 did. He came back with a "Rambo" knife. Then, as planned PW13 called the deceased by phone asking him to come over to the appointed place at the bridge. The general area of the crime scene can be seen in the photograph at exh. P31(13). However when the deceased arrived, the transaction did not go through as the deceased was told by the accused that they had lost their money. The deceased then left in his car. The accused and his two friends returned to PW12's boat where they discussed again their plan to kill the deceased. B C

[5] PW12 went on to testify that not long afterwards, the deceased returned to the scene with PW16. It was on this occasion that the accused stabbed the deceased through the open window of the car while PW13 stabbed PW16 with his own knife from the other side of the window. According to PW12 the deceased was stabbed in the neck and chest. PW16 managed to ward off the attack by grabbing PW13's hand, causing the knife ("exh. P47") to drop inside the car. The deceased shouted ("*apa ini apa ini*" according to PW16) and the car moved forward and plunged into the river. After that the accused went over to the car and took away the deceased's bag, handphone and money. D E F

[6] The evidence of PW13 is materially consistent with the evidence of PW12, in particular with regard to the stabbing of the deceased. I have however treated PW12's and PW13's evidence with caution as both were accomplices of the first degree and thus incapable of corroborating each other. It must be stated however that PW13 is currently serving a seven year jail sentence for the attempted murder of PW16. For obvious reasons witnesses of this category tend to push the blame away from themselves and magnify the role played by the other partners to the crime. This does not mean however that their evidence cannot be believed, only that extra caution must be exercised. If their evidence is confirmed in material particulars by independent evidence or is unchallenged in cross-examination then it is safe to rely on their testimony. The House of Lords in *Davies v. Director of Public Prosecutions* [1954] 1 All ER 507 defines accomplices as follows: G H I

A Persons who are particeps criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact in felonies or persons committing, procuring or aiding and abetting in the case of misdemeanours are accomplices.

B **[7]** As fate would have it, the deceased's companion PW16 survived the attack and lived to tell the tale. His testimony is that on the night of the incident he and the deceased were at Kuala Penyu town when the deceased received a call from someone asking to meet at the bridge. He and the deceased then proceeded to the bridge in the deceased's car. When they met up C with the three intended drug buyers, the sale did not materialise as the deceased was told by the three that they had left their money in the boat. He and the deceased then went back to Kuala Penyu town.

D **[8]** Not long after that, both of them returned to the bridge to continue with the transaction. After waiting for about 20 minutes, PW12, PW13 and the accused arrived on foot and the accused spoke to the deceased. The deceased asked "mahu harga berapa?" and the accused replied "mahu satu paket berharga RM150." E PW13 then told the deceased they only had RM140 and asked for a discount of RM10. The deceased agreed and handed over the *syabu* to one of them. Before the deceased could receive payment the accused suddenly assaulted the deceased through the open window of the car. He was aiming his blows at the neck of F the deceased, causing him to collapse to his seat. At the same time PW16 himself was stabbed by PW13, also in the neck. When all this was taking place the headlights and ceiling light of the car were switched on. This enabled PW16 to see clearly who did what even though the surrounding area was in pitch darkness.

G **[9]** Due to the effect of the injury the deceased pressed the accelerator pedal of the car and this caused the car to move forward and plunge into the river. Five to six minutes later and after PW16 had crawled out through the window of the car he H saw flashes of torchlight coming towards the car. Sensing danger, he jumped on to the road and ran for his life leaving the deceased behind. One of the assailants gave chase but did not manage to catch up with him. PW16 ran straight to the Kuala Penyu police station and made a report. In re-examination PW13 admitted that I he was the one who chased after PW16. He said his intention was to prevent PW16 from reaching the police station. There can be no doubt that his intention was to finish off PW16 as well.

[10] Having seen PW16 giving evidence I have no reason to doubt his trustworthiness as a witness. I find him to be simple and straightforward and had no tendency to embellish evidence. He was honest enough to admit that he did not know what the assailant was armed with when attacking the deceased. He said he only saw the person in the act of repeatedly punching the deceased and the deceased trying to ward off the attack. Of course throughout his evidence PW16 referred to that person as the accused but in the absence of any identification parade soon after the incident I am not placing much reliance on his court identification because by his own admission the accused was a total stranger to him and the first time he saw the accused was at the police station after his arrest.

[11] Be that as it may I am satisfied that PW16 was telling the truth on the evidence that matters, ie, that the deceased was attacked by the person who stood at the driver's side of the car and who spoke to the deceased before he was stabbed to death. This person can only be the accused as PW12 and PW13 were at the other side of the car.

[12] The evidence of PW16 provides sufficient corroboration to the evidence of PW12 and PW13 that it was the accused who stabbed the deceased. It is to be noted that this part of PW12's and PW13's evidence was not challenged at all in cross-examination. Neither was there any challenge to the Forensic Pathologist's ("PW7") evidence that the neck injury sustained by the deceased was a stab injury. The evidence of these witnesses are therefore deemed to be admitted: see *Wong Swee Chin v. PP* [1980] 1 LNS 138. In *Browne v. Dunn* [1893] 6 R 67 this is what Lord Halsbury said at p. 76-77:

> My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord Chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

[13] In any event there is no possibility in my view that PW12 and PW13 could have been mistaken as to the identity of the accused as they were friends. It was submitted by learned counsel that PW12's and PW13's evidence should not be believed as their testimony that the accused was armed with a knife was contradicted by PW16 who said the accused punched the deceased with a clenched fist. With due respect I see no substance in the argument. The unchallenged forensic evidence shows that the neck injury was caused by a sharp object. Graphic details of the neck injury can be seen in the photographs at exhs. P27(11)(12) and P31(9)(10)((15)(16)(17). This injury could not by any stretch of the imagination be caused by a clenched fist. Besides, PW16 did not say that the accused did not use any weapon. He merely said that he was unsure what the accused was using to hit the deceased as he was facing his back and busy texting. Considered together with the evidence of PW12 and PW13 I am satisfied beyond any reasonable doubt that what PW16 saw was actually the accused in the act of stabbing the deceased with a knife.

[14] The forensic pathologist's testimony is that the deceased suffered two stab wounds, one in the neck and the other on the right front of the chest. There were nine other injuries. According to her it was the stab wound in the neck that caused the deceased's death. This injury was about 13cm deep and caused excessive bleeding which resulted in hypovolemic shock and death. She added that the injury was fatal and sufficient in the ordinary course of nature to cause death. There was no challenge to the testimony of PW7 and I accept her evidence that the neck injury was sufficient in the ordinary course of nature to cause death.

Offence Of Murder

[15] Murder is defined by s. 300 of the Penal Code ("the Code") as follows:

> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid.

Prima Facie Case

[16] The law at the close of the prosecution's case is that the evidence led by the prosecution must be subjected to a maximum evaluation and the witnesses must be found to be credible witnesses: *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457. What constitutes a *prima facie* case is defined by s. 173(h) of the Criminal Procedure Code ("the CPC") as follows:

> For the purpose of subparagraphs (i) and (ii), a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[17] In *Balachandran v. PP* [2005] 1 CLJ 85 the Federal Court held that a *prima facie* case is one where the evidence is sufficient to convict the accused if he were to remain silent when called upon to enter his defence. On the strength of PW12's and PW13's evidence as corroborated by PW16, it is clear to me that a *prima facie* case had been established against the accused. By stabbing the deceased with a dangerous weapon on a vital part of his body, the accused must have intended to cause his death. In fact the accused's act falls under all four definitions of murder. In any case the injury that he intended to cause was sufficient in the ordinary course of nature to cause death. This by itself is murder under para. (c) of s. 300 of the Code.

[18] The murder weapon was never recovered but this should not affect the prosecution's case. The evidence is incontrovertible that a knife was used in the attack and this is amply corroborated by independent forensic evidence. The accused was accordingly called upon to state his defence to the charge.

The Defence's Case

[19] The accused chose to give evidence under oath. His defence is that the injury on the deceased's neck was caused accidentally. His explanation is that their plan that night was only to rob the

deceased and that it was PW13 who hatched the idea. He claimed that when he asked PW13 how the robbery was to be carried out, PW13 told him *"kau taruh pisau di leher dia"*. He explained that upon the deceased's arrival at the bridge, the deceased asked for the money but was told by PW13 that the money was left in the boat and PW13 told him he would call back later. After the money was found, PW13 called back the deceased and asked him to wait at the bridge.

[20] The accused testified that after the arrival of the deceased at the bridge for the second time PW13 told him *"kau taruh pisau di leher dia"* to which he said *"ya"*. When they reached the deceased's car, PW13 told him to go to one side of the car and that he (PW13) and PW12 would go to the other side. Again he said *"ya"* and obligingly went to the driver's side of the car. The deceased then asked for the money and PW13 handed it to him. It was at this point according to the accused that he pointed the knife at the deceased's neck. The purpose was to frighten the deceased and this too was done on the instruction of PW13. According to him, the knife was the same knife that PW13 handed to him earlier, which means it was the "Rambo" knife that PW13 took from his house.

[21] What happened next forms the whole basis of the defence case. The accused's story is that as he was holding the knife at the deceased's neck PW13 stabbed PW16 with his own knife at the other side of the car. This startled the deceased and he tried to grab the accused's hand. The accused responded by hitting the deceased with his left hand. This caused the deceased to press the accelerator pedal of the car and the car moved forward. Then, in the accused's own words *"pisau pun masuk di leher dia"* meaning to say the knife pierced the deceased's neck.

Evaluation Of The Accused's Explanation

[22] The first thing to note is that the accused did not deny that he was armed with a knife and that it was him who caused the neck injury. The only question is whether it happened the way he described it. I must say at the outset that I find his story to be inherently incredible. First of all it directly contradicts the evidence of PW12, PW13 and PW16 which I accept as the truth. Secondly, if indeed the neck injury was caused by accident as he claimed, it does not explain why the deceased suffered ten other injuries including the chest injury as evidenced by the post-mortem

report ("exh. P46"). The presence of the ten other injuries corroborates PW16's evidence that the deceased was repeatedly assaulted by the accused.

[23] If as the accused claimed the deceased tried to grab his right hand, how then did the knife come to pierce the deceased's neck so easily? Surely a struggle would have ensued and the knife would have been deflected away from the deceased's neck, even if it is true that the car jerked forward. But the fact is the deceased sustained a 13cm deep stab injury to the neck. A stab wound as the name implies is a result of stabbing, not an involuntary act. What is clear is that the deceased was caught by total surprise and in the position that he was in inside the car there was no way he could defend himself against the murderous assault.

[24] Further, the deceased had agreed to sell the *syabu* at RM150 per packet and in fact gave a discount of RM10. Why then was there the need to threaten him with a knife? For that matter why the need for PW16 to be attacked as well if their plan was not to kill them both? After the car plunged into the river the accused went over to the car and took away the deceased's property. This conduct is wholly inconsistent with the conduct of a man who had just caused grievous injury to a person by accident.

[25] It was alleged that the car moved forward very fast with the tyres spinning before it plunged into the river but this was flatly denied by PW13 who testified under cross-examination that it did not move very fast. It is obvious that the allegation is tailored to suit the defence case of accidental injury.

[26] More importantly the defence of accident was never put to PW12, PW13 and PW16 in cross-examination. It was incumbent on the accused to do so as their version was diametrically opposed to his version. Such failure must be taken to mean that their version could not be disputed at all. The law on this point is stated by Mukharji Jin *AEG Carapiet v. AY Derderian AIR* [1961] Cal 359 as follows:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprises at trial and

A miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[27] In any event the defence of accident is not available to the accused on the facts. This is a defence accorded by s. 80 of the Code which provides as follows:

> Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

[28] Clearly it is not every accidental act that is excusable in law. The kind of accidental acts excusable by law is best explained by the illustration to s. 80 which reads:

> A. is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

[29] In the present case, the plan from the beginning was to kill the deceased and the accused followed through the plan by stabbing the deceased. Clearly therefore the deceased's death was not caused "without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution". I have no doubt that the accused's intention all along was not only to rob the deceased but to finish him off. It was murder in cold blood, as simple as that. PW16 was extremely lucky to be alive for he too was supposed to be killed that night. If the car had not plunged into the river or if PW13 had caught up with him as he was running away from the scene he would in all probability have been dead by now. I reject the accused's defence that the neck injury was caused by accident.

Conclusion

[30] Having rejected the accused's explanation, I have reminded myself of the principle that an accused in a criminal trial has no duty to prove his innocence. In fact he has no duty to prove or to disprove anything unless the burden of proof on a particular fact is reversed by operation of law. The accused is entitled to acquittal if he succeeds in casting a reasonable doubt in the prosecution's case irrespective of whether the court believes his explanation or otherwise: *Mat v. PP* [1963] 1 LNS 82. If upon a review of the whole evidence there is a reasonable doubt as to the guilt of the accused, he must be acquitted: *PP v. Ibrahim Mahmud* [2001] 3 CLJ 284. However proof beyond reasonable doubt must not be confused with proof beyond the shadow or flicker of a doubt. As Lord Denning said in *Miller v. Minister of Pensions* [1947] All ER 372:

> That degree is well-settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

[31] Having considered the entire evidence as required by s. 182A(1) of the CPC, I am satisfied that the accused's explanation has failed to cast any reasonable doubt in the prosecution's case. I am satisfied that the prosecution has proved its case beyond any reasonable doubt. The accused was therefore convicted of the offence charged and sentenced accordingly.